

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 3, 2006

IN RE:

**PETITION TO REQUIRE ATMOS
ENERGY CORPORATION TO APPEAR
AND SHOW CAUSE THAT ITS RATES
ARE JUST AND REASONABLE AND
THAT IT IS NOT OVEREARNING AND
IN VIOLATION OF TENNESSEE LAW**

**DOCKET NO.
04-00356**

DISSENT OF DIRECTOR RON JONES TO THE *ORDER DENYING PETITION*

The above-styled docket came before a panel of the Tennessee Regulatory Authority during an Authority Conference on March 14, 2005. During the deliberations, Directors Deborah Taylor Tate and Sara Kyle voted to deny the *Petition to Require Atmos Energy Corporation to Appear and Show Cause that its Rates are Just and Reasonable and that it is Not Overearning in Violation of Tennessee Law* ("Petition") filed by the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"). The majority filed its *Order Denying Petition* memorializing this decision on January 3, 2006. For the reasons stated herein, I respectfully dissent from the decision of the majority.

I. RELEVANT PROCEDURAL HISTORY

On October 15, 2004, the Consumer Advocate filed a petition requesting that the Authority "initiate a show cause proceeding to investigate the justness and reasonableness of Atmos's rates and to issue a show cause order directing Atmos to show cause why its rates to Tennessee consumers should not be reduced to eliminate excessive earnings, and grant such

other relief as may be appropriate.”¹ Atmos Energy Corporation (“Atmos”) filed a response on November 16, 2004 in which it claims that: (1) the Consumer Advocate lacks the authority to initiate a show cause, (2) a preliminary investigation is required before a show cause order may issue, (3) a show cause may only issue by motion of the Authority, (4) the Consumer Advocate is improperly attempting to shift the burden to Atmos, and (5) the *Petition* does not allege sufficient grounds to convene a contested case or open an investigation.² The Consumer Advocate filed its reply addressing Atmos’s contentions on January 14, 2005. In this reply, the Consumer Advocate clarifies that it intended in its *Petition* to assert as avenues of relief the opening of an investigation or the convening of a contested case.³

II. DISCUSSION

I take issue with the conclusions contained in the *Order Denying Petition*, and therefore, I dissent. In the order, the majority first concludes that the *Petition* “does not fall within the ambit of Tenn. Code Ann. § 65-4-118(b)(1).”⁴ Second and related to the first conclusion, the majority determines that the “*Petition*, in its present form, was not the appropriate mechanism to commence a show cause proceeding.”⁵ Third, the majority concludes that the *Petition* “did not contain sufficient allegations upon which the TRA could issue a show cause order.”⁶ For the reasons given below, I cannot support these determinations.

¹ *Petition to Require Atmos Energy Corporation to Appear and Show Cause that its Rates are Just and Reasonable and that it is not Overearning in Violation of Tennessee Law*, 3 (Oct 15, 2004).

² See *Atmos Energy Corporation’s Response to Show Cause Petition*, 2 (Nov 16, 2004) (summarizing arguments made on pages 3-17).

³ See *Reply of Consumer Advocate to Atmos Energy Corporation’s Response to Petition*, 1-2 (Jan. 14, 2005).

⁴ *Order Denying Petition*, 5 (Jan. 3, 2006).

⁵ *Id.*

⁶ *Id.*

A. TENNESSEE CODE ANNOTATED SECTION 65-4-118(b)(1)⁷ AND THE APPROPRIATENESS OF THE MECHANISM

The majority concludes that the *Petition* “does not fall within the ambit of Tenn. Code Ann. § 65-4-118(b)(1) because the *Petition* does not seek to ‘initiate’ a proceeding before the Authority ‘in accordance with the [UAPA] and the rules of the authority.’”⁸ In the next sentence, the majority states: “Instead, the *Petition* asks the TRA to initiate a show cause proceeding.”⁹ My understanding of the majority’s line of reasoning is that asking the Authority to initiate a show cause proceeding is not in accordance with the Uniform Administrative Procedures Act¹⁰ (“UAPA”) or the Authority’s rules. The majority later states that the *Petition* is “not the appropriate mechanism to commence a show cause proceeding.”¹¹ Given the lack of any underlying support for this conclusion, I must assume again that the focus here is on the requested relief, that is, the commencement of a show cause proceeding. This line of reasoning fails to recognize that the Consumer Advocate not only requested the issuance of a show cause order, but also requested the opening of an investigation or the convening of a contested case.¹² The majority’s decision falls short in this respect.

Neither the UAPA nor our rules contemplate a party requesting the Authority issue a show cause order based solely on allegations in a petition or complaint. The Authority may only

⁷ At the time the Consumer Advocate filed the *Petition*, Tenn. Code Ann. § 65-4-118(b)(1) was codified at § 65-4-118(c)(2)(A).

⁸ *OrderDenying Petition*, 5 (Jan. 3, 2006) (alteration in original).

⁹ *Id*

¹⁰ See Tenn. Code Ann. tit. 4, ch. 5.

¹¹ *OrderDenying Petition*, 5 (Jan. 3, 2006)

¹² See *Petition to Require Atmos Energy Corporation to Appear and Show Cause that its Rates are Just and Reasonable and that it is not Overearning in Violation of Tennessee Law*, 3 (Oct 15, 2004); *Reply of Consumer Advocate to Atmos Energy Corporation’s Response to Petition*, 1-2 (Jan. 14, 2005).

issue a show cause order after it conducts a preliminary investigation. Tenn. Code Ann. § 65-2-106 is clear on this point:

The authority is empowered and authorized in the exercise of the powers and jurisdiction conferred upon it by law to issue orders on its own motion citing persons under its jurisdiction to appear before it and show cause why the authority should not take such action as the authority shall indicate in its show cause order appears justified by preliminary investigation made by the authority under the powers conferred upon it by law.¹³

The language “appears justified by preliminary investigation made by the authority” establishes the need for the Authority to conduct a preliminary investigation before issuing a show cause order. Thus, absent a preliminary investigation, the Authority may not issue a show cause order based solely on the allegations in a petition or complaint.

What Tenn. Code Ann. § 65-2-106 fails to address is the manner in which the investigation may be initiated or in which the investigation may be conducted. Tenn. Code Ann. § 65-4-117 provides guidance, however. This section affords the Authority the power to investigate upon the filing of a written complaint.¹⁴ Thus, while the Authority may not issue a show cause order based solely on the allegations in a complaint or petition, it is reasonable to conclude that it is wholly appropriate for a party to request the initiation of an investigation, as the Consumer Advocate did here through the filing of a petition, in an effort to precipitate the filing of a show cause order by the Authority. Alternatively, it is appropriate for the Consumer Advocate to request as an avenue of relief the convening of a contested case in which it would bear the burden of proof.¹⁵ Based on the foregoing, it is my opinion that the *Petition* is consistent with Tenn. Code Ann. § 65-4-118 and is an appropriate mechanism to commence a show cause proceeding.

¹³ Tenn. Code Ann. § 65-2-106 (2004) (emphasis added).

¹⁴ *Id.* § 65-4-117 (2004).

¹⁵ See Tenn. Comp. R. & Regs. 1220-1-2-.02(5) (rev July 2003).

B. Sufficiency of the Allegations in the *Petition*

In its *Order Denying Petition*, the majority determined that the *Petition* “did not contain sufficient allegations upon which the TRA could issue a show cause order.”¹⁶ It is unclear from the *Order Denying Petition* what defect plagued the allegations, but a review of the transcript reveals that at least one Director was of the opinion that the grounds on which the *Petition* was brought “don’t hold merit.”¹⁷ I cannot join in this conclusion as it is contrary to my opinion of how this agency should exercise its discretion when determining how to proceed on petitions and complaints.

On the same day as the deliberations in this docket, March 14, 2005, I determined in Docket No. 04-00416 that “the Authority should not cut the legs out from underneath the consumer advocate by determining the merits of its claim before providing it a full opportunity to develop those claims.”¹⁸ The conclusion that the grounds of the *Petition* lack merit does just that in this docket. Therefore, I cannot agree with this conclusion.

Contrary to my colleagues, it is my position that the allegations are sufficient to justify the convening of a contested case or the opening of an investigation. Authority Rule 1220-1-2-.02(4) governs the contents of complaints. Pursuant to this rule, a complaint objecting to a tariff “shall state the nature of the interest, the grounds for any such objection and the relief sought.”¹⁹ In my opinion, the *Petition* contains these elements.

¹⁶ *Order Denying Petition*, 5 (_____, 2005).

¹⁷ Transcript of Proceedings, p. 21 (Mar. 14, 2005) (deliberations in Docket No. 04-00356).

¹⁸ *Id.* pp. 29-30 (deliberations in Docket No. 04-00416). I have voiced this same opinion using different language in other dockets as well. See, e.g., *In re Tariff to Establish the Wireless Answers Promotion – Tariff Number. 20031036*, Docket No. 03-00554, *Dissent of Director Ron Jones to Orders Allowing Tariff Numbers 2003-1036 and 2003-1379 to Take Effect*, 11 (Apr. 28, 2004); *In re: BellSouth’s Tariff to Introduce Welcoming Reward Program*, Docket No. 03-00060, *Dissent of Director Ron Jones to Order Dismissing Petition to Suspend Tariff (and Denying Complaint and Petition to Intervene)*, 3 (Apr. 25, 2003).

¹⁹ Tenn. Comp. R. & Regs. 1220-1-2-.02(4) (Rev. July 2003).

The Consumer Advocate explains that the nature of its interest is the representation of the interests of Tennessee consumers and Atmos offers natural gas services to Tennessee consumers.²⁰ These allegations provide a link between Atmos and the representative interest of the Consumer Advocate. As grounds for its objection to Atmos's effective rates, the Consumer Advocate cites Atmos's current rate of return as reported on its form 3.03 filed with the Authority and compares that rate of return with the rate of return recently adopted by the Authority for Chattanooga Gas Company in Docket No. 04-00034.²¹ Last, the Consumer Advocate states as its requested relief the initiation of "a show cause proceeding to investigate the justness and reasonableness of Atmos's rates and to issue a show cause order directing Atmos to show cause why its rates to Tennessee consumers should not be reduced to eliminate excessive earnings, and grant such other relief as may be appropriate."²² As previously discussed, this request is appropriate. Considering these allegations along with the requirements of Authority Rule 1220-1-2-.02(4), it is my determination that the Consumer Advocate filed a sufficient complaint.

III. CONCLUSION

Despite my conclusion that the Consumer Advocate properly requested the Authority initiate an investigation, I determined after reviewing the pleadings that the most efficient and equitable manner in which to proceed was to convene a contested case, relief also requested by the Consumer Advocate. The basis for my decision was three-fold. First, the Consumer Advocate has the statutory authority to collect information to develop its position both through

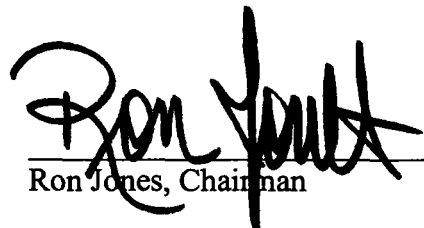
²⁰ See *Petition to Require Atmos Energy Corporation to Appear and Show Cause that its Rates are Just and Reasonable and that it is not Overearning in Violation of Tennessee Law*, 1-2 (Oct. 15, 2004).

²¹ See *id.* at 2-3.

²² *Id.* at 3.

its enabling legislation and the statutes governing contested cases.²³ Second, the Consumer Advocate has not alleged that Atmos's earnings exceed its current authorized rate of return, but rather that Atmos's authorized rate of return and rates, which were set by this agency, are too high.²⁴ Third, the Consumer Advocate requests the initiation of contested case as a means of relief.²⁵ These three findings weigh in favor of placing the burden of proof on the Consumer Advocate. Therefore, it is my opinion that the most efficient and equitable manner in which to proceed is to convene a contested case with the Consumer Advocate bearing the burden of proof.

For the foregoing stated reasons, it is my opinion that the panel should convene a contested case for the purpose of determining whether Atmos Energy Corporation's rates are just and reasonable and appointed General Counsel or his designee to prepare this matter for a hearing and deliberations by the panel. Because the majority chose to deny the *Petition*, I dissent.



Ron Jones, Chairman

²³ See Tenn. Code Ann. §§ 4-5-311(a) (1998) & 65-4-118(b)(2) (2004)

²⁴ See *Petition to Require Atmos Energy Corporation to Appear and Show Cause that its Rates are Just and Reasonable and that it is not Overearning in Violation of Tennessee Law*, 3 (Oct. 15, 2004).

²⁵ See *Reply of Consumer Advocate to Atmos Energy Corporation's Response to Petition*, 1-2 (Jan. 14, 2005).